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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, )  
Plaintiff, ) No. 4:15-cr-6049-EFS-16  
vs. )  
EDGAR OMAR HERRERA FARIAS, ) DEFENDANT EDGAR OMAR  
Defendant. ) HERRERA FARIAS' )  
 ) OBJECTIONS TO )  
 ) PRESENTENCE )  
 ) INVESTIGATION REPORT )  
 ) (PSIR) )  
 )  
 )

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The Defendant, by and through his appointed to counsel, objects to the Presentence Investigation Report (hereinafter “PSIR) as follows:

OBJECTION NO. 1: On pg. 1 of the PSIR it states that Count 1 is a Class A Felony punishable by 10 years to life imprisonment. As stated herein, Mr. Herrera Farias submits that due to the way Court 1 was drafted that he was charged with an 18 U.S.C. § 371 conspiracy for which the maximum sentence is not more than 5 years. Count 1 charges that the Defendant and others conspired “to commit the following offense against the United States.” This is a § 371 conspiracy, which punishes two or

1 more persons who conspire “to commit any offense against the United States” as a  
 2 required element.

3       21 U.S.C. § 846 punishes “any person who ... conspires to commit any offense  
 4 in this subchapter” which is Subchapter 13 of the Controlled Substance Act.

5       The Ninth Circuit sitting *en banc* has held that conspiracy offenses charged  
 6 under 18 U.S.C. § 371, are separate offenses from conspiracies alleged under the  
 7 Controlled Substance Act. *United States v. Arlt*, 252 F.3d 1032, 1039 (9th Cir. 2001).  
 8  
 9 The Ninth Circuit concluded that “Congress intended that crimes charged in Count  
 10 One [under 21 U.S.C. § 846] and Two [18 U.S.C. § 371 *to be separate offenses.*” *Id.*  
 11  
 12 (emphasis added).

13       OBJECTION NO. 2: Mr. Herrera Farias objects to ¶ 34, 40, 45, 56, 97, 98 and  
 14 101. Mr. Herrera Farias states he never transported drugs into Canada and was never  
 15 in charge of backpackers after Ivan Calvillo was arrested. Mr. Calvillo “was arrested  
 16 in April 2012, in California subsequently deported.” PSIR at ¶ 28. Mr. Herrera Farias  
 17 supposedly took over after Calvillo’s arrest in 2012. *Id.*, at ¶ 45. Mr. Herrera Farias  
 18 was arrested in Yakima County, Washington on March 22, 2012. PSIR at ¶ 27 and  
 19  
 20 127. On August 23, 2012 the Yakima County Superior Court sentenced Mr. Herrera  
 21 Farias to three months confinement with credit for 47 days served and the balance to  
 22 be served in home detention with GPS monitoring. See attached Yakima County  
 23  
 24 Felony Judgment and Sentence. Mr. Herrera Farias was thereafter arrested on  
 25  
 26

1 December 13, 2012 and held on an immigration hold until he was deported on March  
 2 27, 2013. PSIR at ¶ 138. It would have been difficult for Mr. Herrera Farias to be in  
 3 charge of drugs coming from California to Washington to be transported into Canada  
 4 by backpackers. This impeaches the Confidential Sources and Cooperating  
 5 Defendants cited by the PSIR, who are unidentified. All of these sources are co-  
 6 conspirators in this case. Their statements inculpating Mr. Herrera Farias are  
 7 inherently unreliable.

8  
 9 In *United States v. Vera*, 893 F.3d 689, 692-93 (9th Cir. 2018), the Ninth Circuit  
 10 recognized the “the Supreme Court’s ‘time-honored teaching’ that ‘a codefendant’s  
 11 confession inculpating the accused is inherently unreliable’ is ‘equally applicable in  
 12 the sentencing as in the conviction context.’” *Id.*, quoting *United States v. Pimental-*  
 13 *Lopez*, 859 F.3d 1134, 1144 (9th Cir. 2016) in turn quoting *Lee v. Illinois*, 476 U.S.  
 14 530, 546 (1986).

15  
 16 A co-conspirator “may adopt facts that the government wants to hear in  
 17 exchange for some benefit, usually a lesser sentence.” *Id.*, at 693. The statements  
 18 implicating others “were made in an attempt to curry favor from federal authorities.”  
 19 *Id.*, quoting *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir. 1990). Thus,  
 20 the statements are inherently unreliable.

21  
 22 Further, ¶ 98 states that some conversations the CD and Mr. Herrera Farias were  
 23 recorded, this is not true. When questioned, the Government determined that there

were no recorded calls.

In ¶ 29-30, a CD explains that it was Rosa Granodos that organized and drove backpackers to trail locations near the Canadian border in 2012. Mr. Herrera Farias is not identified. Likewise, ¶ 31 another CD describes large quantities of methamphetamine was transported from California to Washington in 2012 and the person involved. Again, Mr. Herrera Farias is not mentioned.

Mr. Herrera Farias' sentencing exhibits ECF No. 1142 demonstrate that Mr. Herrera Farias was in his home town of Michoacán from October 2013 to August 2016.

Paragraphs 34, 40, 45, 56, 97, 98 and 101 should be stricken from the PSIR as unreliable because they are contradicted by Mr. Herrera Farias' Yakima County conviction and statements made by other CD's.

OBJECTION NO. 3: ¶ 98 states that "[s]ome conversations between [a CD and Mr. Herrera Farias] were recorded by agents." If the Court does not delete the ¶ based upon Objection No. 2, this sentence should be removed because the conversations were not recorded.

OBJECTION NO. 4: ¶ 99 should be corrected to state that Mr. Herrera Farias was arrested on December 13, 2016, instead of the incorrect date of December 15, 2016.

OBJECTION NO. 5: Mr. Herrera Farias requested a CD to find witnesses to verify he sold, purchased and repaired motor vehicles which he, in fact, did. Mr.

1 Herrera Farias did not ask a CD to find witnesses to say that was his only work and ¶'s  
2 100 and 104 of the PSIR should be corrected accordingly.

3 OBJECTION NO. 6: ¶ 101 should be corrected to state that Mr. Herrera Farias  
4 is from the village of Michoacán, not from Colima where Ivan Calvillo was from. The  
5 description of Mr. Herrera Farias and Mr. Calvillo having a “close” relationship is  
6 conclusory and not based on any articulated facts. Mr. Herrera Farias denies working  
7 with backpackers. ¶ 101, if not deleted on the basis of Objection No. 2, it should be  
8 corrected accordingly.

9 OBJECTION NO. 7: Mr. Herrera Farias objects to ¶'s 102, 109 and 110  
10 because they are based upon speculation, and ignore the requirement that relevant  
11 conduct for jointly undertaken criminal conduct be “within the scope of the jointly  
12 undertaken criminal activity.” U.S.S.G. § 1B1.3 (a)(1)(B)(i). As application note 3(B)  
13 to this guideline explains,

14 [T]he accountability of the defendant for acts of others is limited by the  
15 scope of his or her agreement to jointly undertake the particular  
16 criminal activity. Acts of others that were not within the scope of the  
17 defendant's agreement, even if those acts were known or reasonably  
18 foreseeable to the defendant, are not relevant conduct under subsection  
19 (a)(1)(B).

20 In cases involving contraband (including controlled substances), the  
21 scope of the jointly undertaken criminal activity (and thus the  
22 accountability of the defendant for the contraband that was the object  
23 of that jointly undertaken activity) may depend upon whether, in the  
24 particular circumstances, the nature of the offense is more appropriately  
25 viewed as one jointly undertaken criminal activity or as number of

1 separate criminal activities.

2 Here, Mr. Herrera Farias has admitted he distributed drugs for Ivan Calvillo.

3 The only actual evidence of drugs in Mr. Herrera Farias possession is found in ¶'s 27  
4 and 99. Mr. Herrera Farias was not in the United States for almost three years, from  
5 October 2013 to August 2016. See Sentencing Exhibits.

6 In ¶ 27 Mr. Herrera Farias was found to be in possession of 211.3 grams of  
7 methamphetamine on March 22, 2012. In ¶ 99, Mr. Herrera Farias was in possession  
8 of “\$130 cash, about an ounce of suspected cocaine, and, a cell phone.” Apparently  
9 the suspected “cocaine” was never tested and should not be used in determining Mr.  
10 Herrera Farias’ offense level.

11 The PSIR relies on unreliable statements by co-conspirators that are impeached.  
12 See Objection No. 1. Moreover, even if the unreliable co-conspirators statements are  
13 used, they are conclusory and not based on facts. The PSIR admits that it is speculating  
14 as to the amount of drugs and number of times Mr. Herrera Farias had drugs in arriving  
15 at the base offense level of 38. PSIR at ¶ 109.

16 In *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1148-48 (9th Cir. 1999), the  
17 Ninth Circuit reversed a sentence based upon the case agent’s interview of two co-  
18 conspirators that reported how much drugs were being distributed on a weekly basis.  
19 The Court reversed and remanded for re-sentencing because “[t]he district court’s  
20 estimate of the conspiracy’s weekly sales is supported only by the unexplained

1 conclusions drawn from unrevealed out-of-court statements.”

2 The Government bears the burden to prove the weight quantity of drugs by a  
3 preponderance of evidence. *United States v. Culp*, 300 F.3d 1069, 1076 (9th Cir.  
4 2002). The Court must “err on the side of caution” in approximating drug quantity.  
5 *United States v. Kilby*, 443 F.3d 1135, 1141 (9th Cir. 2006).

6  
7 Therefore, it is submitted that Mr. Herrera Farias’ base offense level should be  
8 26 under §2D.1.1(c)(7) for the 211.3 grams of methamphetamine seized on March 22,  
9 2012.

10  
11 OBJECTION NO. 8: Mr. Herrera Farias should receive a downward  
12 adjustment on of 3 levels pursuant to 2X1.1(b)(2) in ¶ 113.

13  
14 OBJECTION NO. 9: The three-level enhancement because Mr. Herrera Farias  
15 is alleged to be a manager or supervisor in ¶ 113 under §3B1.1(b) should be deleted.  
16 Mr. Herrera Farias was neither an organizer, leader, manager or supervisor. His  
17 participation in the conspiracy was short-lived in 2012 and evidenced by the seizure  
18 of the 211.3 grams of methamphetamine on March 22, 2012.

19  
20 Furthermore, Mr. Herrera Farias has an oral plea agreement with the  
21 Government, which was placed on the record at the time of the change of plea on  
22 October 10, 2018. The Government agreed not to seek an enhancement under §3B1.1.  
23 In the interests of fostering the settlement of criminal cases, the Court should honor  
24 this agreement and not impose the enhancement.

OBJECTION NO. 10: Mr. Herrera Farias' Total Offense Level in ¶ 118 should therefore be changed 21 (base level 26, less 3 conspiracy guideline, less 2 acceptance of responsibility).

OBJECTION NO. 11: The two criminal history points in ¶ 137 should be removed. The Yakima County conviction possession of a controlled substance is relevant conduct under § 1B1.3 for the instant case. See ¶ 27. There is no further reliable evidence of Mr. Herrera Farias' involvement in the conspiracy. It is not just or correct to make his criminal history higher based on the very conduct he is now being sentenced for. This conviction is not criminal history, rather it is the basis of what Mr. Herrera Farias is now being sentenced.

OBJECTION NO. 12: The two criminal history points in ¶ 134 should be removed. ¶ 134 adds the two points because “the defendant committed the instant offense while under a criminal sentence of probation for the Union Gap Municipal Court.” However, the basis of putting him on probation was the relevant conduct described in ¶ 27. Further, no evidence exists that Mr. Herrera Farias committed any further conduct in the conspiracy after being placed on probation.

OBJECTION NO. 13: Based on the foregoing, the total criminal history score should be one resulting in a Criminal History Category of I. ¶ 135 should be corrected accordingly.

OBJECTION NO. 14: ¶ 144 should be clarified by striking the last sentence

1 and replaced by the following: The Defendant was never seen in or around the truck.  
2 Officers located suspected narcotics in the truck, however, the substance was never  
3 tested to determine what it was. A firearm was located in the truck.  
4

5 OBJECTION NO. 15: Per Objection No. 1, ¶ 169 should be changed to read:  
6 Statutory Provisions: The maximum term of imprisonment is not more than 5 years.  
7 18 U.S.C. § 371.  
8

9 OBJECTION NO. 16: Per Objections No. 7, 8, 9, 11, 12 and 13, ¶ 170 should  
10 to be changed to read: Guideline Provisions: Based upon a total offense level of 21  
11 and Criminal History Category of I, the guideline imprisonment is 37 months to 46.  
12

13 OBJECTION NO. 17: Per Objection No. 1, ¶ 171 should be changed to read:  
14 Statutory Provisions: The Court may impose supervised release of not more than three  
15 years. 18 U.S.C. § 3583(b)(2) and 3559 (a)(4).  
16

17 OBJECTION NO. 18: Per Objection No. 1, ¶ 172 should be changed to read:  
18 Guideline Provisions: The guideline range for a term of supervised release is at least  
19 one year but not more than three years. U.S.S.G. 5D1.2(a)(2).  
20

21 OBJECTION NO. 19: Per Objection No. 1, ¶ 173 should be changed to read:  
22 Statutory Provisions: The Defendant is eligible for probation. 18 U.S.C. § 3561(a).  
23

24 OBJECTION NO. 20: Per Objections No. 1, 7, 8, 9, 11, 12 and 13 the cite to  
25 the U.S.S.G. should be changed to 5B1.1(a)(1) and (2).  
26

OBJECTION NO. 21: Per Objection No. 1, ¶ 175 should be changed to read:

1 Statutory Provisions: The maximum fine is per 18 U.S.C. § 371.

2 OBJECTION NO. 22: The table in ¶ 189 should be changed to be consistent  
3 with the foregoing Objections.

4 RESPECTFULLY submitted this 20<sup>th</sup> day of February 2019.

5  
6 WALDO, SCHWEDA  
7 & MONTGOMERY, P.S.  
8 By: /s/ Peter S. Schweda  
9 PETER S. SCHWEDA  
10 Attorney for Defendant Herrera Farias

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 20, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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